

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of:

Petition of Three Rivers Provider Network, Inc.  
For Waiver of Section 64.1200(a)(4)(iv)  
of the Commission's Rules

**PETITION OF THREE RIVERS PROVIDER NETWORK, INC.  
FOR RETROACTIVE WAIVER**

Petitioner Three Rivers Provider Network, Inc. ("TRPN" or "Petitioner")<sup>1</sup> respectfully requests that the Federal Communications Commission (the "Commission") grant it a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) (the "Regulation") concerning fax(es) transmitted by TRPN or on its behalf prior to April 30, 2015. This request is pursuant to the Commission's October 30, 2014 Order,<sup>2</sup> the Orders issued by the Consumer and Governmental Affairs Bureau (the "Bureau") on August 28, 2015 and December 9, 2015,<sup>3</sup> and Section 1.3 of the Commission's rules.

**BACKGROUND OF THE RETROACTIVE WAIVER**

Following receipt of petitions for clarifications of the rule, the Commission acknowledged an inconsistency in the statutory prohibition on sending via facsimile "unsolicited advertisements," defined as "material advertising the commercial availability of or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."<sup>4</sup> The statutory framework provided that an opt-out notice is required in sending fax advertisements to those who provided express permission to the sender

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<sup>1</sup> This request includes the John Doe defendants named in *Dr. David L. Brouillette, D.C., S.C. v. Three Rivers Provider Network, Inc. and John Does 1-10*, Case No. 2:16-cv-166 (E.D. Wis.), without conceding that the lawsuit properly names John Does 1-10 as defendants or that they sent any facsimiles as alleged in the suit.

<sup>2</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 29 FCC Rcd. 13998 (rel. October 30, 2014) (hereinafter "*2014 Order*").

<sup>3</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-976 (rel. Aug. 28, 2015) (hereinafter "*August 28 Order*"); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-1402 ¶ 12 (rel. Dec. 9, 2015) (hereinafter "*December 9 Order*").

<sup>4</sup> The statutory prohibition is codified in the Telephone Consumer Protection Act ("TCPA"), as amended by the Junk Fax Prevention Act of 2005 ("JFPA"). See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); see also Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C. § 227 *et seq.*

while the Commission stated also that the opt-out provision applies only to unsolicited fax advertisements.<sup>5</sup>

Due to the inconsistency, the Commission granted retroactive waivers to the petitioners affected, providing relief from the past obligation to provide opt-out notice to advertisement facsimile recipients, and provided that similarly situated parties could seek such relief as well.<sup>6</sup> The Bureau also granted waivers to parties similarly situated to the petitioners in its August 28 and December 9 Orders.<sup>7</sup> The Bureau specified that waiver requests received after April 30, 2015 for facsimiles sent before April 30, 2015 were permissible and consistent with the purpose of the waiver order because the individuals involved were similarly situated to the petitioners.<sup>8</sup>

## ARGUMENT

TRPN should receive a waiver for faxes that were solicited and were sent before April 30, 2015 under the *2014 Order* because TRPN is similarly situated to the parties who have been granted waivers previously.

TRPN was served on February 29, 2016 with a complaint in a lawsuit entitled *Dr. David L. Brouillette, D.C., S.C. v. Three Rivers Provider Network, Inc. and John Does 1-10*, Case No. 2:16-cv-166 (E.D. Wis.), purporting to be a class action lawsuit alleging violations of the TCPA. Edelman, Combs, Lattuner & Goodwin, LLC, a firm that has filed numerous, boilerplate complaints alleging TCPA violations, also filed this complaint. The complaint states that TRPN sent the plaintiff faxes over an unknown period of time that did not contain the required opt-out notices. Indeed, another company has sought a similar waiver from the Commission because of a lawsuit filed by the same firm for the same purported violations of the TCPA.<sup>9</sup>

The same finding of good cause as to the original petitioners voiced in the *2014 Anda Commission Order* applies here: the lack of clarity regarding the opt-out provision requirement.<sup>10</sup> Thus, TRPN is entitled to a retroactive waiver because the Commission's requirements were

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<sup>5</sup> See 47 C.F.R. § 64.1200(a)(4)(iv); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration*, 21 FCC Rcd at 3812, ¶ 48; 3818, ¶ 42 n.154 (2006) (the "*Junk Fax Order*").

<sup>6</sup> *2014 Anda Commission Order* ¶¶ 1, 2, 22, 30.

<sup>7</sup> *August 28 Order* ¶ 11; *December 9 Order* ¶ 10.

<sup>8</sup> *August 28 Order* ¶ 20; *December 9 Order* ¶ 18.

<sup>9</sup> In the Matter of: Petition of LKN Communications, Inc. d/b/a ACN, Inc. For Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules; *Dr. David L. Brouillette, D.C., S.C. v. ACN Opportunity, LLC and John Does*, Case No. 2:16-cv-136 (E.D. Wis.).

<sup>10</sup> *2014 Anda Commission Order* ¶¶ 24-26.

met: “no record evidence demonstrates that [TRPN] understood that [it] did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so,” and TRPN “referenced the confusion between the footnote and the rule.”<sup>11</sup>

Additionally, the Bureau “decline[d] to conduct a factual analysis to determine whether the petitioners actually obtained consent,” because that “remains a question for triers of fact in the private litigation,” so “assuming that proper consent was obtained[,] petitioners qualify for limited retroactive waivers if they did not include the requisite opt-out notice.”<sup>12</sup> Thus, the factual determination is not relevant to the waiver analysis.

As the Commission explained, it goes against public interest to “potentially subject [businesses] to significant damage awards under the TCPA’s private right of action or possible Commission enforcement” given the contradictory requirements regarding the opt-out provision.<sup>13</sup>

### CONCLUSION

For the foregoing reasons, TRPN respectfully requests that the Commission grant this Waiver Petition and the request for a retroactive waiver of the Regulation for the fax advertisements allegedly transmitted by or on behalf of TRPN before April 30, 2015.

April 28, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Z. A. [unclear] Esq.", with a large, stylized loop at the bottom.

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<sup>11</sup> August 28 Order ¶ 15; December 9 Order ¶¶ 14, 30.

<sup>12</sup> August 28 Order ¶ 17, 30 FCC Rcd. At 8610.

<sup>13</sup> 2014 And a Commission Order ¶ 27.